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No. 10-110

IN THE

Supreme Court of the United States

JAMES BEN BROWNFIELD,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a criminal defendant has a Sixth Amendment right to have a jury determine the existence of the statutory aggravating facts upon which a capital sentence is based.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner James Ben Brownfield respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Brownfield's conviction and sentence, *Brownfield v. State*, No. CR-04-0743 (Ala. Crim. App. April 27, 2007), is attached at App. 17a through 104a. The opinion of the Supreme Court of Alabama affirming the judgment of the Alabama Court of Criminal Appeals, *Ex parte James Ben Brownfield, Jr.*, No. 1070255 (Ala. Dec. 23, 2009), is attached at App. 3a through 16a. The order of the Supreme Court of Alabama overruling Mr. Brownfield's application for a rehearing, *Ex parte James Ben Brownfield, Jr.*, No. 1070255 (Ala. Feb. 19, 2010), is attached at App. 1a through 2a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of Alabama is invoked under 28 U.S.C. § 1257(a). Petitioner has asserted below and is asserting before this Court the deprivation of rights secured by the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Alabama's Sentencing Scheme

A trial for a capital offense in Alabama may proceed through three phases:

1. *Innocence/Guilt Phase*

The jury finds the defendant innocent or guilty beyond a reasonable doubt of at least one of eighteen codified capital offenses. Ala. Code § 13A-5-40(a).

2. *Sentencing Phase—Advisory Jury*

If the defendant is found guilty of a capital offense, then the advisory jury must determine whether the defendant committed a capital crime in combination with at least one of ten statutory aggravating facts. Ala. Code § 13A-5-49. The jury is authorized to recommend a death sentence if (1) it finds at least one aggravating fact beyond a reasonable doubt, (2) the aggravating fact(s) outweigh any mitigating circumstance(s), and (3) at least ten jurors recommend death. *Id.* § 13A-5-46(e)-(f). Otherwise, the jury must recommend life without parole. *Id.* § 13A-5-46(e).

The jury must return a written verdict that indicates its sentencing recommendation and the total number of votes for and against the sentence. *Id.* § 13A-5-46(f). The jury is not required to provide a verdict detailing what aggravating facts, if any, were found beyond a reasonable doubt.

3. *Sentencing Phase—Judge*

Final sentencing authority is vested in the judge. The court must "give[] consideration" to the jury's recommendation, but is not bound by it and may override the jury's recommendation. *See* Ala. Code § 13A-5-47(e); *Ex parte Waldrop*, 859 So.2d 1181, 1193 (Ala. 2002) (affirming court's imposition of death sentence over jury's recommendation

of life). The court decides upon a sentence "by determin[ing] whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." Ala. Code. § 13A-5-47(e).

The judge cannot impose the death sentence unless the jury has found at least one statutory aggravating fact beyond a reasonable doubt. *Ex parte Waldrop*, 859 So.2d at 1188. However "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala. Code § 13A-5-45(e).

Mr. Brownfield's Trial, Sentencing & Appeal

The State of Alabama charged Mr. Brownfield with three counts of murder in separate cases, which were consolidated for trial. Those counts consisted of (1) murder during a burglary in the first degree, (2) murder of two or more persons pursuant to one act, scheme, or course of conduct, and (3) murder of an individual less than fourteen years of age. App. 120a-125a. On February 25, 2004, a twelve-person jury found Mr. Brownfield guilty of all counts. App. 126a-128a.

1. *Advisory Jury Sentence*

On February 26, 2004, a sentencing hearing for Mr. Brownfield was held before an advisory jury, which would recommend either death or life imprisonment without eligibility for parole. App. 143a-144a.

The jury was instructed to consider the following three, statutory aggravating facts: (1) whether the offense was "especially heinous, atrocious, or cruel compared to other capital offenses," (2) whether "the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct," and (3) whether the offense was "committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, burglary."[1] App. 185a-188a. The first two facts applied to all three counts, and the third fact applied only to the count involving murder committed during a burglary in the first degree. *Id.* Two of these aggravating facts—regarding common scheme and burglary – were elements of the capital offenses that the jury had found Mr. Brownfield guilty of committing during the innocence/guilt phase of the trial. App. 120a-128a. The third aggravating fact—especially heinous, atrocious, or cruel ("HAC")—had not previously been submitted to the jury.

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[1] The aggravating factors are codified as follows:

- The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping.
- The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.
- The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

Ala. Code, §§ 13A-5-49(4), (8), (9).

During closing arguments, counsel for the State emphasized the HAC aggravating fact, asserting that this fact, in combination with the common-scheme fact, "would outweigh anything that the defendant has offered to you in the way of mitigating circumstances." App. 180a.

In addition to aggravating facts, the court also instructed the advisory jury to consider several mitigating circumstances listed by the court as well as "any aspect of [the] defendant's background and life and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death." App. 191a-192a. The court explained that whether the jurors chose a sentence of life without parole or death "depends on whether aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances." App. 184a.

After receiving these instructions and deliberating, the jury returned a non-unanimous advisory verdict recommending that Mr. Brownfield be punished by death. According to the general verdict form, the vote was eleven for death and one for life imprisonment without parole. App. 129a-132a. There is no indication which mitigating or aggravating facts were found and weighed by the jury.

2. *Fact-Finding and Sentencing by Judge*

The court held a sentencing hearing on April 29, 2004. It found beyond a reasonable doubt all three aggravating facts. App. 148a-155a, 162a.

With respect to two of the aggravating facts that had comprised elements of the offenses previously

found by the jury during the innocence/guilt phase of the trial, the court "concur[red] with the jury's finding." App. 149a, 154a-155a. The court concluded that the burglary aggravating fact was applicable only to the offense of murder during a burglary in the first degree. App. 148a. The court found that the common-scheme aggravating fact was applicable to all three offenses. App. 154a-155a.

With respect to the aggravating fact of "especially heinous, atrocious, or cruel," the trial court found that "the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses." App. 153a. The court also found this fact applicable to all three offenses. The court detailed the evidence in support of this aggravating fact and explained that each murder was "a conscienceless or pitiless crime," "unnecessarily torturous to the victim," and involving "brutality" that "exceeds that which is normally present in a capital case." App. 151a.

In counterbalance to these three aggravating facts, the court found one statutory mitigating circumstance: no significant history of prior criminal activity. App. 155a. In addition, the court described several non-statutory mitigating factors, including a "substance dependence disorder," Mr. Brownfield's cooperation with police after his arrest, and his remorse over the murders at issue. App. 160a-161a.

After "consider[ing] the recommendation of the jury in its advisory verdict and giv[ing] it due weight," the court concluded that the aggravating

facts outweighed the mitigating circumstances and sentenced Mr. Brownfield to death for all three offenses. App. 161a-162a.

Mr. Brownfield unsuccessfully moved for a new trial, arguing, *inter alia*, that he had been denied "the right to a trial by a fair and impartial jury" in violation of the Sixth and Fourteenth Amendments. App. 170a.

3. *Appeal to the Alabama Court of Criminal Appeals*

On appeal, Mr. Brownfield's counsel raised several issues, including whether the jury's advisory verdict had violated Mr. Brownfield's Sixth-Amendment rights in light of this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002). App. 111a-119a. The Alabama Court of Criminal Appeals rejected Mr. Brownfield's arguments, holding, in relevant part, that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a.

4. *Appeal to the Alabama Supreme Court*

Mr. Brownfield appealed the decision of the Court of Criminal Appeals to the Supreme Court of Alabama, arguing, *inter alia*, that the jury's advisory verdict had violated Mr. Brownfield's Sixth-Amendment rights in light of this Court's holding in *Ring v. Arizona*. App. 107a-108a. The Supreme Court of Alabama did not address Mr. Brownfield's arguments regarding the Sixth

Amendment.[2] Instead, the Supreme Court of Alabama limited its written opinion to evaluating the admissibility at trial of a court-appointed psychologist's testimony. App. 3a-16a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The difference between life and death for Mr. Brownfield depended upon a fact found by the judge, instead of a jury. Believing herself to be unconstrained by the Sixth Amendment, the judge found that Mr. Brownfield's crime was "especially heinous, atrocious, or cruel" and then used that significant aggravating fact to condemn Mr. Brownfield to death. Mr. Brownfield's sentence was affirmed according to an erroneous view of the Sixth Amendment: that the sentencing judge can find and consider any statutory aggravating fact (no matter how significant), provided that the jury has previously found a single aggravating fact (no matter how tangential to the judge's final sentencing determination). In states like Alabama, where aggravating facts must outweigh mitigating circumstances before a death penalty can be imposed, judge-found facts are increasing defendants' legislatively prescribed maximum sen-

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[2] The Alabama Supreme Court's failure to address Mr. Brownfield's Sixth Amendment argument under *Ring v. Arizona* does not prejudice his ability to raise that issue before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) ("[D]espite the State Supreme Court's failure to address the constitutional issue, it is clear that [defendant's] asserted denial of due process is properly before us" because the defendant raised his objection before the state court).

tences from life to death. This outcomes defies this Court's holdings in *Ring v. Arizona* and *Blakely v. Washington*, which required that a jury find any aggravating fact necessary for imposition of the death penalty and which clarified that the relevant maximum sentence is the one that can be imposed without any additional fact-finding.[3]

The constitutional error in Mr. Brownfield's case has been repeated in state supreme courts throughout the country, leading to conflicting interpretations of the Sixth Amendment in capital cases among the highest state courts. In addition to the Supreme Court of Alabama, supreme courts in Delaware and Florida have erroneously held that a single, jury-found aggravating fact creates a theoretical "maximum" sentence of death. These states' courts then make that theory a reality by allowing a judge to find any aggravating facts necessary to impose capital punishment. In contrast, supreme courts in states including Arizona, Colorado, Indiana, and Nebraska have concluded that capital defendants have a right to a jury trial on aggravating facts used to determine a death sentence.

This Court should grant certiorari in order to resolve a significant dispute among state supreme courts regarding a fundamental constitutional right and to ensure that, before depriving an individual of his life, the State has "suffer[ed] the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of [a defen-

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[3] *Ring* did not address a judicial finding of a prior-conviction aggravating factor, which is not at issue in this petition.

dant's] equals and neighbors, rather than a lone employee of the State." *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (internal citation and quotation marks omitted).

II. ALABAMA AND OTHER STATE SUPREME COURTS ARE APPLYING CONFLICTING SIXTH-AMENDMENT STANDARDS IN CAPITAL CASES.

Under the Sixth Amendment (as applied to the states through the Fourteenth Amendment), "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. at 589. At issue in *Ring* was a capital sentencing scheme in which the judge was solely responsible for making findings regarding statutory aggravating facts and mitigating circumstances. Arizona's scheme authorized "the judge to sentence the defendant to death only if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 593 (internal quotation marks omitted). This Court held that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" by increasing the defendant's punishment beyond life without parole. *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). The Court concluded that the Sixth Amendment applies to "the factfinding necessary to put [a defendant] to death" and therefore does not permit a sentencing judge, sitting without a jury, to find an aggravating fact necessary for imposition of the death penalty. *Id.* at 609.

Ring involved only a single aggravating fact, and the Court therefore did not explicitly address whether a jury need find only a single aggravating fact (which might render the defendant potentially eligible for the death penalty) or whether all aggravating facts that formed the basis of a defendant's sentence must be subject to jury proof. On remand, the Arizona Supreme Court held that *Ring's* mandate called for the submission of all aggravating facts to the jury. It explained:

> A narrow reading of *Ring* [] may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring* [] should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring* [] requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* [], implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

State v. Ring, 65 P.3d 915, 942-43 (Ariz. 2003).

Courts have subsequently differed in their interpretation of *Ring*, with one state supreme court justice commenting that "*Ring* has raised at least as many questions in the state courts as it has answered." *Duest v. State*, 855 So.2d 33, 51 (Fla. 2003) (Pariente, J., concurring). Alabama's

Supreme Court has repeatedly interpreted *Ring* to require a jury-finding of only a single aggravating fact before allowing the judge to find additional statutory aggravating facts. *See Ex parte McNabb*, 887 So.2d 998, 1006 (Ala. 2004) ("The jury's unanimous finding of one aggravating circumstance is sufficient to satisfy *Ring*."); *Ex parte Hodges*, 856 So.2d 936, 944 (Ala. 2003) (holding that jury's finding of one aggravating fact during innocence/guilt phase of trial was sufficient to satisfy Sixth Amendment, regardless of whether trial court considered other aggravating facts not found by the jury); *Ex parte Waldrop*, 859 So.2d at 1188 (holding that defendant became eligible for death penalty upon jury's finding of single aggravating fact during innocence/guilt phase of trial, and Sixth Amendment was therefore not violated by court's consideration of other aggravating facts not found by jury). Other state supreme courts have reached similar interpretations. *See, e.g.*, *Brice v. State*, 815 A.2d 314, 321-22 (Del. 2003) (accepting State's argument that *Ring* "merely requires the jury to find the existence of one statutory aggravating factor before the judge may consider all aggravating" facts); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) (rejecting Sixth-Amendment argument under *Ring* where judge, after recognizing defendant's prior violent felony aggravator conviction, proceeded to find two important aggravating facts that were weighed in calculus of death).

But, in addition to Arizona, other states' Supreme Courts and State Supreme Court Justices have adhered to a contrary interpretation of *Ring*. As the former Chief Justice of the Florida Supreme Court explained:

> [T]he view that the presence of a single . . . aggravating circumstance gives a trial judge free hand to find multiple . . . aggravating circumstances constitutes not only the most narrow reading of *Ring* possible, it is a reading that conflicts with *Ring's* central principle as well. *Ring* is, at its heart, based on the guarantee of the right to trial by jury provided in the Sixth Amendment of the United States Constitution. *Ring, Apprendi*, and these two opinions' predecessor, *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), stressed the essential nature and historical importance of the Sixth Amendment's right of trial by jury. These decisions each determined that the Sixth Amendment required a jury to find the existence of facts that increased a defendant's sentence beyond that allowed by a conviction alone. The *Ring* opinion was especially emphatic in rejecting form over substance in prohibiting a judge alone from making the factual findings actually utilized in sentencing a defendant to death. *See Ring*, 536 U.S. at 604, 122 S.Ct. 2428.

Duest, 855 So.2d at 57 n.24. (Anstead, C.J., concurring in part and dissenting in part). *See also People v. Montour*, 157 P.3d 489, 497 (Col. 2007) ("Because a defendant is not eligible for the death penalty until all aggravating factors are weighed against all mitigating factors, the presence of one *Blakely*-exempt aggravating factor standing alone does not make a capital defendant eligible for the death penalty. . . . Capital defendants have a right to a jury trial on all aggravating facts used

to determine death eligibility."); *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004) ("The Supreme Court has now made clear that statutory aggravators in Indiana's Death Penalty law are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt."); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003) ("*Ring v. Arizona* therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of [the defendant's] sentence of death, other than a prior criminal conviction, must be determined by a jury." (internal citation omitted)).

These conflicting opinions have resulted in different Sixth-Amendment standards in capital cases throughout this country.

III. THE STATE OF ALABAMA VIOLATED MR. BROWNFIELD'S SIXTH-AMENDMENT RIGHT TO HAVE A JURY DETERMINE THE EXISTENCE OF AN AGGRAVATING FACT UPON WHICH HIS CAPITAL SENTENCE WAS BASED.

A. The Sixth Amendment Required a Jury To Find The Statutory Aggravating Facts Upon Which Mr. Brownfield's Capital Sentence Was Based.

Mr. Brownfield's sentence was increased beyond the maximum prescribed under Alabama law according to factual findings by a judge. In affirming this outcome, Alabama's Court of Criminal Appeals followed its State's precedent in holding that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously

found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a. The Alabama Supreme Court declined to address Mr. Brownfield's Sixth-Amendment arguments on appeal. In so holding, the Alabama courts violated Mr. Brownfield's right to a jury trial under the Sixth Amendment.

In light of this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), it is more evident than ever that all aggravating facts essential to a death sentence must be found by a jury beyond a reasonable doubt. *Blakely* clarified that, when *Ring* referred to the "maximum" sentence that a defendant could receive under the Sixth Amendment, this "maximum" referred "not [to] the maximum sentence a judge may impose after finding additional facts, but [to] the maximum he may impose without any additional findings." *Id.* at 303-04 (discussing *Ring*). The sentencing judge in *Blakely* had found that, in kidnapping his ex-wife, defendant Blakely had acted with "deliberate cruelty" and accordingly sentenced him above the standard range to a term of incarceration of 90 months. *Id.* at 300. In rejecting the judge-made "deliberate cruelty" finding, the Court explained, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Id.* at 304 (internal citation and quotation marks omitted).

This Court's holdings in *Ring* and *Blakely* make clear that any of Alabama's statutory aggravating facts (including the aggravating fact at issue in this case: "especially heinous, atrocious, or cruel")

that are used by a court to impose a death sentence must be found by a jury beyond a reasonable doubt. The finding of a single aggravating fact by a jury does not permit the judge to find additional statutory aggravating facts that enhance a capital defendant's punishment. This is because, under Alabama law, death is the legislatively prescribed maximum punishment for a defendant guilty of a capital offense only if at least two criteria are met. First, the State must establish beyond a reasonable doubt at least one statutorily defined aggravating fact.[4] Second, the aggravating fact(s) must be sufficiently significant to outweigh the mitigating circumstances.[5] Otherwise, the maximum sentence is life without parole.

Alabama courts, including the trial judge in Mr. Brownfield's case, have acknowledged that the mere finding of a single aggravating fact is insuf-

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[4] *See* Ala. Code § 13A-5-45(e)-(f) ("At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. . . . Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.").

[5] *See* Ala. Code § 13A-5-47(e) ("the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist"); § 13A-5-46(e)(2) ("If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole"); § 13A-5-46(e)(3) ("If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.").

ficient to impose the death penalty. Alabama's Court of Criminal Appeals has explained that "Alabama's statutory sentencing scheme" does not "'presume[]' that death is the appropriate punishment upon the finding of the existence of at least one aggravating circumstance." *Kuenzel v. State*, 577 So.2d 474, 521 (Ala. Crim. App. 1990).[6] The Court of Criminal Appeals has further stated "[a] greater punishment—death—*may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." *Ex parte Woodard*, 631 So.2d 1065, 1071 (Ala. Crim. App. 1993) (citing Ala. Code §§ 13A-5-45(f), 13A-5-46(e), 13A-5-47(e) (emphases in original))); *see also Ex parte Trawick*, 698 So.2d 162, 173-74 (Ala. 1997) ("The trial court correctly instructed the jury to recommend the death penalty only if it found that the aggravating circumstances outweighed the mitigating circumstances, obviously implying that in all other circumstances the jury was required to recommend a sentence of life imprisonment without parole."). Likewise, the trial judge in Mr. Brownfield's case instructed the jurors that whether they chose a sentence of life

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[6] *See also Cochran v. State*, 500 So.2d 1161, 1178 (Ala. Crim. App. 1984) (aff'd in part, rev'd on other grounds, 500 So.2d at 1179 (Ala. 1985)) ("'In other words, the mere presence of an aggravating circumstance, apparently even in absence of a mitigating circumstance, does not automatically dictate a death sentence. The aggravating circumstance must be found sufficient to support the death penalty.'" (quoting J. Colquitt, The Death Penalty Laws of Alabama, 33 Ala. L. Rev. 213, 318 n.713 (1982)).

without parole or death "depends on whether aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances." App. 184a.

Applying this Court's logic in *Apprendi*, a single aggravating fact under the Alabama Code—if insufficient to outweigh any mitigating factors—does not "increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 496. In Mr. Brownfield's case, if the sole aggravating fact(s) found by the jury did not weigh in favor of death, then the maximum, legislatively prescribed sentence was life without parole. To the extent that additional fact-finding (namely, the finding of the HAC aggravating fact) was used to increase Mr. Brownfield's maximum sentence to death, then that fact should have been found by a jury because it was legally essential to Mr. Brownfield's punishment. *See Blakely*, 542 U.S. at 313 ("[E]very defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

The Court of Criminal Appeals therefore erred in holding that the finding of a single aggravating fact—regardless of whether it was sufficient to sentence Mr. Brownfield to death—allowed the judge to find another statutory aggravating fact to count in favor of death. In concluding that Mr. Brownfield may be sentenced to death on the basis of a judge-found aggravating fact, the Alabama Court of Criminal Appeals relied upon the Alabama Supreme Court's decision in *Waldrop*. App. 89a-92a. *Waldrop*, in turn, cited Ala. Code § 13A-5-45 in support of its conclusion that the

judge (purportedly pursuant to *Ring*) can consider aggravating facts not found by the jury. *Waldrop*, 859 So.2d at 1188. That Alabama statute provides "[u]nless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole." Ala. Code § 13A-5-45(f). That statute does not, however, undermine the additional (and constitutionally significant) statutory prerequisite that sufficiently weighty aggravating facts must be found in order for a defendant to be sentenced to death.

In Mr. Brownfield's case, the Sixth Amendment required that any of Alabama's statutorily prescribed aggravating facts that—whether alone or in combination—were held to outweigh mitigating circumstances should have been found by a jury beyond a reasonable doubt.

B. Despite the Sixth-Amendment Requirement that the Jury Find All Statutory Aggravating Facts Essential to Mr. Brownfield's Death Sentence, The Trial Judge Sentenced Mr. Brownfield to Death on the Basis of an Aggravating Fact that Was Not Found By the Jury.

Although the jurors never indicated that they had found the HAC aggravating fact beyond a reasonable doubt, the trial judge concluded that "the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses." App. 153a. The court then used this judge-found aggravating fact—in combination

with other aggravating facts—to determine that Mr. Brownfield deserved to die. App. 161a ("[T]he court has engaged in the process of weighing the aggravating and mitigating circumstances as required by law. In each case, the court determines that the aggravating circumstances outweigh the mitigating circumstances.").[7]

Even though two of the aggravating facts considered by the court mirrored the capital offenses found by the jury during the innocence/guilt phase of Mr. Brownfield's trial, the mere existence of those aggravating facts did not render Mr. Brownfield eligible for death. That is because there is no indication that the judge would have sentenced Mr. Brownfield to death solely on the basis of the aggravating facts regarding burglary and a common scheme. To the contrary, the HAC aggravating fact formed the crux of the trial court's conclusion that Mr. Brownfield deserved to die. The trial court acknowledged that the "[t]he law of this state recognizes that it is possible in at least some situations that one or few aggravating circumstances might outweigh a larger number of mitigating circumstances." App. 195a. Then, in its sentencing order, the trial court devoted more than four pages to detailing the especially heinous, atrocious, or cruel nature of the offenses, while spending a paragraph on the other two

[7] The requirement that the jury find all *aggravating* facts upon which a death sentence is based does not necessarily apply to *mitigating* circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-91 n.16 (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation").

aggravating facts.[8] *Compare* App. 149a-153a *with* App. 148a-149a, 154a-155a. Similarly, in affirming Mr. Brownfield's death sentence, the appellate court quoted at length from the trial court's finding of the HAC aggravating fact and then separately discussed in detail the evidence supporting the HAC fact. App. 94a-99a, 100a-101a. In contrast, the appellate court devoted only two sentences apiece to its finding of the other aggravating facts. App. 99a-100a. The record strongly suggests that the HAC aggravating fact was integral to Mr. Brownfield's death sentence.

C. The Violation of Mr. Brownfield's Sixth-Amendment Rights Was Not Harmless Error.

The failure to submit a sentencing fact to the jury in violation of the Sixth Amendment may be harmless error. *Washington v. Recuenco*, 548 U.S. 212, 222 (2006). But the lack of a procedural mechanism in the trial court for obtaining a jury finding demonstrates that the associated error was not harmless. *Id.* at 218 ("If . . . Washington law does not provide for a procedure by which [the] jury could have made a finding pertaining to [the sentencing factor], that . . . suggests that respondent will be able to demonstrate that the *Blakely* violation *in* [the] *particular case* was not harmless."). One judicial opinion has explained

[8] There are other indications that the burglary aggravating fact, in particular, was not central to Mr. Brownfield's sentence. First, that aggravating fact did not apply to two of the three offenses. App. 148a. Second, the State took the position that the balance weighed in favor of death without the burglary aggravating fact. App. 180a.

this nuance to harmless-error analysis as follows: "if the jury has no means of making the finding, how can a reviewing court presume that the jury would have made that finding regardless of the prohibition against it?" *People v. Harper*, 739 N.W.2d 523, 668 n.17 (Mich. 2007) (Kelly, J., dissenting).

The Sixth-Amendment error in Mr. Brownfield's case was not harmless because Alabama lacks a procedural mechanism for obtaining a jury finding of a HAC aggravating fact to be used in sentencing. The Alabama Code does not provide for an advisory sentencing jury to make specific findings of aggravating facts, and the sentencing jury in Mr. Brownfield's case made no such findings. Even if the advisory jury made recommendations of aggravating facts, Alabama law provides that the sentencing judge—not the advisory jury—must find the aggravating facts to be used in sentencing. *See* Ala. Code § 13A-5-47(e) ("the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." (emphasis added)). In Mr. Brownfield's case, the judge followed the Alabama Code and found the aggravating facts that sentenced Mr. Brownfield to death. *See, e.g.* App. 149a, 153a ("The court finds that the State proved beyond a reasonable doubt that the defendant committed the capital offense of murder . . . during the commission of a burglary in the first degree. . . . The court finds that the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses."). Since the advisory sentencing jury

in Alabama has no means of making a determinative finding of the HAC aggravating fact, it would be nonsensical for another court to presume that the advisory jury would have made that factual finding regardless of the jury's incapacity.

Because the violation of Mr. Brownfield's sentence was not harmless error, his sentence should be vacated.

CONCLUSION

Form would be elevated over substance if a jury finding of aggravating facts, which may have been insufficient on their own to sentence Mr. Brownfield to death, meant that the jury need not find the aggravating fact that condemned Mr. Brownfield. To recognize Mr. Brownfield's Sixth-Amendment right with respect to aggravating facts that may have been insufficient to tip the scale towards death—but then to deny Mr. Brownfield his Sixth- Amendment right with respect to the crucial fact that may have pushed his sentence beyond life without parole—undermines Mr. Brownfield's constitutional right to a jury determination of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Such a result would be an end-run around this Court's holding in *Ring* and *Blakely* that would make a mockery of the Sixth-Amendment principles upheld in those decisions.

For the foregoing reasons, petitioner prays that this Court grant certiorari to the Alabama Supreme Court and declare his rights were violated.

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